SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 238

OLSON BODIES INC., formerly GRUMMAN ALLIED INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE U. A. W.— INTERVENOR

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MEMORANDUM OF INTERVENOR IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Involved

As will appear from the "Statement of the Case" (*infra*) the "Questions Presented" by the Petitioner [1] are not based on the facts of the case.[2]

1. The National Labor Relations Board, did study the findings and decisions of the Regional Director before denying Petitioner's request for review.

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[1] Petition p. 2.

[2] References made herein are to the Appendix filed in the Court below or to the Petition filed herein, and they will be so designated.

As the Court of Appeals in *N. L. R. B.* v. *Magnesium Casting Company*, First Circuit, decided May 21, 1970 said:

> "The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for Review, 29 C. F. R. #102.67(d), and on that basis it concluded that the Company's claims . . . presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contention."

In the instant case, too, the company in its Request for Review submitted all the evidence to the Board (Appendix, pp. 148-222), which the Board undoubtedly studied before it denied the Request for Review.[3]

2. No timely request has been made for absentee or home ballots on behalf of the "alleged" ill employees.

The question posed should be:

Did the Regional Director commit a prejudicial and reversible error, under the circumstances, by denying the request of the employer for a change in the mode of balloting?

3. There were no "material and substantial disputed issues of fact", which would entitle the petitioner to a hearing.[3]

The question posed should be:

Is a denial by the N.L.R.B. of a Request for Review, which request does not raise any material and substantial issues of fact, but is based solely on a disagreement with a Regional Director's decision on uncontested issues, a denial of due process?

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[3] Petition, p. 2.

Statement of the Case and Proceedings Below

On September 27, 1966, a petition for certification pursuant to Section 9(c) of the National Labor Relations Act was filed by the Intervenor. A hearing was held before a hearing officer of the National Labor Relations Board, on October 28, 1966, November 4, November 16, and November 17, 1966.

At the hearing much testimony was taken as to individual employees. The company wanted to include and the Petitioner sought to exclude the "assistant foremen (William Hally, Dale Barkman, Orlando Greco, Walter Palmer, Joseph Lowe, and Raymond Reischer) and the chief inspector (Oliver Dedrick) as supervisors within the meaning of the Act; the cleaning women (Bertha Moore, Sally Withbeck, and Jane Waldron), the coffee girl (Eleanor Cassaiels), a technician (Walter Wortenberg), and Walter Sutter, Thomas Brennan, and Walter Dorpfeld as not having a community of interest with the production and maintenance employees; manufacturing liaison man (Donald Shelly) as a professional employee; and clerical employees (William Peters, Fred Biesel, and William Stacy) as office clerical employees."[4]

The status of Davenport was not raised by the employer, or the union, and no testimony was taken at the hearing as to his status. Nor did his name appear on the eligibility list submitted by the employer to the National Labor Relations Board prior to the election.

The election was scheduled for February 17, 1967, at the company's plant. On February 15, 1967, at 5:37 p.m., the employer sent a telegram to the Regional Director, requesting home or mail voting for fifteen employees, some

[4] Appendix p. 23 (Decision and Direction of Election).

of whom "have been ill for several months".[5] The request was denied by the Regional Director.

At the election, eleven of the fifteen employees on whose behalf the employer sent the telegram, appeared and voted. Four did not.

At the election, Mr. Davenport appeared at the polls, and was challenged by the representative of the National Labor Relations Board, on the ground that his name did not appear on the eligibility list.

The result of the election was: 110 votes for the union and 109 against.

The company filed timely objections to: 1. the challenge of Mr. Davenport; 2. the refusal of the request to grant home ballotting to the "ill-employees"; and 3. alleged union's conduct effecting the results of the election.

The Regional Director "has duly investigated the challenge and the objections"[6] and made the following findings and determinations:

1. "That Davenport's principal duties and interest are more closely allied to those of the engineering department, and . . . he should be excluded from the production and maintenance unit", and therefore sustained the challenge to his ballot.[7]

2. Overruled objections Nos. 2 and 3.

In his investigation of the challenge, the Regional Director took numerous affidavits and interviewed various witnesses of the employer, all of which affidavits were in support of the company's objections to the challenge.

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[5] Appendix p. 128-129.

[6] Appendix p. 135.

[7] Appendix p. 143.

Although the Regional Director stated in his supplemental decision and Certification of Representative that: "The Petitioner contends Davenport is a liaison man between the engineering and drafting departments, and is not part of the production and maintenance unit . . .",[8] the record does not show that he either interviewed or took affidavits from any of the union representatives as to their claim. The only document setting forth the contention of the union is: The charging party's motion to dismiss the objections to the conduct of elections, dated March 6, 1967.[9]

The Regional Director based his findings of fact and conclusions of law solely on the evidence and affidavits submitted by the employer in opposition to the challenge.

Following the certification, the company filed a request for review of the Regional Director's Supplemental Decision and Certification of Representative on the issue of the challenge and the vote of the ill employees, and asked for a hearing. It did not contest his decision as to the "conduct of the union affecting the result of the election."[10]

On May 23, 1967, the Board denied the company's request as raising "no substantial issues warranting review."[11]

The union requested collective bargaining on April 28, 1967, and again on June 1, 1967, and the company refused.

Charges of refusal to bargain were thereupon filed by the union and a complaint was issued by the Board.[12]

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[8] Appendix p. 135.

[9] Appendix p. 1, "3. 6. 67-charging party's motion. . . .

[10] Appendix p. 148-223.

[11] Appendix p. 223.

[12] Appendix p. 227-232.

In its answer the company admitted its refusal to bargain on the ground that the certification was "improper".[13]

On August 17, 1967, the N.L.R.B. moved for summary judgment.[14]

On August 22, 1967 the Trial Examiner issued an order directing the parties to show cause why summary judgment should not issue".[15]

On September 21, 1967, the company filed a response to general counsel's motion for summary judgment.[16]

On December 6, 1967, the Trial Examiner issued his decision finding the company guilty of violation of Section 8(a)(5) of the Act and recommending an order to be issued by the Board.[17]

On January 8, 1968, the company filed exceptions to Trial Examiner's decision.[18]

On April 23, 1968 the Board affirmed and adopted the decision of the Trial Examiner, in which it states:

> "The Board has considered the Trial Examiner's decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner [19] (170 N. L. R. B. No. 34).

Upon failure of the Respondent to comply with the Board order, an application was made by the Board for

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[13] Appendix pp. 232-235 #8 p. 234.

[14] Appendix pp. 235-252.

[15] Appendix p. 252.

[16] Appendix pp. 253-270.

[17] Appendix pp. 10-21.

[18] Appendix p. 22-31.

[19] Appendix p. 32.

enforcement, which application was granted on February 3, 1970, by Friendly, Smith and Feinberg, Circuit Judges, after hearing arguments of all parties.

On March 4, 1970, a petition by the company for review *en banc* was denied by Honorable J. Edmund Lumbard, chief judge of the Court of Appeals, second circuit.

POINT I

The Board was not required to grant a review of the Regional Director's findings of fact and conclusions of law.

Section 3(b) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. #151 et seq.) which gives the Board the authority to delegate to its regional directors its power under Section 9, provides:

> ". . . except that upon the filing of a request therefor with the Board by any interested person, the Board *may* review any action of a regional director delegated to him under this paragraph . . ." (emphasis supplied).

It is, respectfully submitted, that the above provision is permissive and discretionary with the Board, and not mandatory, as the Petitioner herein would have the Court determine.

a) The Petitioner, apparently, concedes the following grounds provided for in Sec. 102.67 of the Board's Rules and Regulations for granting a request for review of a Regional Director's decision:

> "(1) That a substantial question of law or policy is raised because of (i) the absence, or (ii) a departure from, officially reported Board precedent.
>
> "(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the

record and such error prejudicially affects the rights of a party.

"(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

"(4) That there are compelling reasons for reconsideration of an important Board rule or policy" (Petition, p. 7).

It is, respectfully submitted, that none of the prerequisites for a review set forth in the above rule, is applicable herein.

(1) There is no substantial question of law or policy because of (i) the absence of, or (ii) a departure from, officially reported Board precedents. On the contrary: the Board, in refusing the request for a review of the Regional Director's Supplemental Decision and Certification of Representatives adhered to its established policy that a hearing is not a matter of right unless substantial and material issues are raised. *O. K. Van and Storage, Inc.*, 127 NLRB 1537, enf'd 297 F.2d 74 (C.A. 5, 1961); *Air Control Window Products, Inc.*, 335 F.2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality". Also *N.L.R.B.* v. *Bata Shoe Co.*, 377 F.2d 821, 826 (C.A. 4, 1967).

In *N.L.R.B.* v. *K.V.P. Southerland Paper Co.*, 356 F.2d 671 (C.A. 6, 1966) and *N.L.R.B.* v. *Bata Shoe Co.*, 377 F.2d 821, 9 C.A. 4, 1967) the Board did grant hearings because there were substantial and material issues.

The only issue raised by Petitioner herein as to the challenged ballot was whether the Regional Director's conclusion in upholding the challenge was reversible error. The evidence shows that the Regional Director in investigating the challenge took affidavits from the challengee and from various company officials who were opposed to the challenge. He disclosed his evidence to the company at-

torneys and permitted them to file additional affidavits to correct any possible omissions and to offer additional information. His decision was based solely on the evidence contained in the affidavits of the company. No contrary evidence or affidavits were submitted by the union except for a general statement.[29] Under the circumstances, there was no need for a hearing. There were no contradictory statements of fact to be resolved at a hearing. Nor were there any additional facts submitted which were not previously included in the affidavits. A hearing under these circumstances would have been merely a repetition of the evidence offered in the affidavits on which evidence the Regional Director relied. Such a hearing would be a mockery of court procedure and a useless waste of energy and time.

(2) Although the decision of the regional director might have affected the wishes and rights of the petitioner, there is not a shred of evidence that he decided a substantial issue of fact. What he did was to apply his expertise knowledge to make a determination solely on the uncontradicted facts submitted by the company, as to whether Mr. Davenport was or was not part of the bargaining unit.

(3) No ruling in connection with the proceeding has resulted in prejudicial error. The fact that the ruling was not to the liking of the company, is not in itself error.

(4) Nor did the petitioner show *any* reasons, let alone compelling ones, "for reconsideration of an important Board rule or policy".

b) The attempt of the Petitioner to claim a conflict between the various Courts of Appeal on the question of a hearing is inapplicable to the issues at bar. All circuit Courts are in agreement on facts similar to the instant case.

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[29] Footnote 9 supra.

In *Pepsi-Cola Buffalo Bottling Co.* v. *N. L. R. B.*, 409 F.2d 676 (2d Cir.), *cert. denied*, 396 U.S. 904 (1969), the issues were entirely different from those in the instant case. The *Pepsi-Cola* case involved a determination whether a group of distributors were employees or independent contractors which "is difficult and requires a fine-drawn balancing of facts and law". In the instant case, there was only the question of whether, upon the facts submitted and relied upon, a given employee was or was not a member of the bargaining unit. In the *Pepsi-Cola* case there was conflicting evidence on the challenges. In the instant case there was no conflict of evidence. All the evidence was submitted by the employer.

In fact, the Court of Appeals of the Second Circuit in granting enforcement herein differentiated the instant case from that of *Pepsi-Cola*:

> "Accepting *Pepsi-Cola* we do not regard it as making remand automatic whenever the Board has declined to review a decision of a regional director under powers delegated to him pursuant to #3(b). This court was there dealing with an issue, whether distributors were employees or independent contractors, which, as the Board conceded, 'is difficult and requires a fine-drawn balancing of facts and law,' 409 F.2d at 679. See *N. L. R. B.* v. *United Ins. Co.*, 390 U.S. 254 (1968). The questions here were the refusal to arrange for absentee or home voting by ill employees and to correctness of the inference the Regional Director had drawn from largely undisputed facts relating to the work of a single employee. These are the very types of issues where the Board, like an appellate court, would properly defer to the judgment of the tribunal of first instance—and also the kinds of issues where the desire of Congress to help the Board with its workload, see remarks of Senator Goldwater, 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1856, would apply with peculiar force. We are convinced that a remand here for review of

> the Regional Director's decision would, in contrast to Pepsi-Cola, be "an idle and useless formality," *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n. 6 (1969) (opinion of Mr. Justice Fortas), accomplishing nothing save further delay."

N. L. R. B. v. *Magnesium Casting Co.*, — F.2d — (1st Circuit, decided May 21, 1970) although criticizing the Court of Appeals decision in *Pepsi-Cola* (*supra*) reaches the same conclusion as the Second Circuit did in the instant case.

In the *Magnesium* case, the question involved the supervisory status of three employees. The company's request for Review of the Regional Director's decision was denied by the Board "as raising no substantial issues warranting review". The company refused to bargain with the union. The Trial Examiner granted a motion for summary judgment, which was affirmed by the Board.

The Court granting enforcement, stated:

> ". . . [T]he Regional Director's determination should be sustained if supported by substantial evidence."
>
> . . .
>
> ". . . [if] 'deference to expertise' and 'substantial evidence' mean anything in this area of labor law it is that courts should not substitute their judgment in the close cases. We have found only one recent decision where the Board's determination that certain men were not supervisors was reversed by a court of appeals. *NLRB* v. *Metropolitan Life Insurance Co., supra;* compare Illinois State Journal-Register, Inc., v. NLRB, 412 F.2d 37 (7th Cir. 1969); *NLRB* v. *Little Rock Downtowner, Inc., supra* at 1089; *NLRB* v. *Swift and Company, supra* at 563. Metropolitan Life presented a much clearer case of 'supervisory' status than do the inconclusive facts regarding Scott. We hold that the Regional Director's determination with regard to these three men is supported by substantial evidence."
>
> . . .

". . . [T]he slate was etched rather clearly, we think, when Congress amended section 3(b) of the Act, 28 U.S.C. #153(b), in 1959. Section 3(b) begins by authorizing the Board to delegate to three or more of its members 'any and all of the powers which it may exercise', and then, as amended, provides that '[t]he Board is also authorized to delegate to its regional directors its power under section [9 of the Act] . . . to determine the unit appropriate for the purposes of collective bargaining . . . except that the Board may review any action of the Regional Director . . .' Taken together, the two provisions reflect a Congressional decision to allow the Board —within the specified limits to permit its delegates to act in its stead."

"The Company contends that the section 3(b) amendment *on its face* confines the Regional Directors to the exercise of powers under section 9, and thus that a Regional Director's unit determination pursuant to section 9 can have no effect in a subsequent unfair labor practice proceeding under section 10. That argument, however, overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers, it is not required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10. *e.g., Pittsburgh Plate Glass Co.* v. *Labor Board,* 313 U.S. 146(1941); *Amalgamated Clothing Workers* v. *N. L. R. B.,* 365 F.2d 898, 902-904(D. C. Cir. 1966); Riverside Pres, Inc. v. NLRB, 415 F.2d 281, 284 (5th Cir. 1969). Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Director's determination when not set aside by the Board—is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded."

. . .

". . . [T]he section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determination sufficiently

> comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding."
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> . . .
>
> "The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for Review, 29 C. F. R. #102, 67 (d), and on that basis it concluded that the company's claims regarding the status of the three assistant foremen presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions."

It is respectfully submitted that if there are any conflicts between the 1st and 2nd circuit Court of Appeals, they deal with the issue of difficult and "fine-drawn balancing of facts and law". Both circuits fully agree on the application of existing law to the facts in the instant case.

The case of *N. L. R. B.* v. *Clement Blythe Company*, 451 F2d 78 (1969) decided September 9, 1969, U. S. Court of Appeals Fourth Circuit, is also distinguished from the case at bar.

In that case, the issue was the propriety of an election generally. The company claimed that no election should be held because the company was in the process of growth, and the complement of its employees did not reflect the actual number of prospective employees.

It requested a review by the Board of the Regional Director's decision and order of election. The issues there were basic.

In the instant case, although there was much testimony and disagreement on the scope of the unit as well as the inclusion of various individuals in the bargaining unit, the employer did not except to the decision of the Regional Director on the bargaining unit, or to the Direction of Election. Its objections were solely to the decision of the Regional Director of a challenge and his refusal to change the mode of balloting, the request for which was not timely.

The decision of the Board in denying requests for review on the ground that there were "no substantial issues warranting review" was made after a study by the Board of the material submitted by the Respondent. The Board under Section 3(b) of the National Labor Relations Act could and did rely on the findings of the Regional Director and affirmed his findings and decisions to the same affect as it does with reference to findings of fact and conclusion of law of a Trial Examiner.

While there may be a conflict of opinions among various circuits in cases of "fine-drawn balancing of facts and law", there is no conflict among the circuits on the application of Section 3(b) of the National Labor Relations Act, as amended, to the facts in the instant case, and certiorari does not lie.

POINT II

The denial of special voting provisions for ill employees was proper.

The petition for certification in the instant case was filed on September 27, 1966. Upon refusal of the employer to consent to an election, hearings were held on October 28, 1966, November 4, November 16, and November 17, 1966. A decision to conduct an election was made on January 16, 1967, and the election was scheduled for February 17, 1967,

at 2:15 p.m. at the plant of the employer in Athens, New York.

Neither at the hearings nor any subsequent conferences in preparation for the election did the employer raise the question of ill employees.

On February 15, 1967, at 5:37 p.m., the counsel for the employer having its office in New York, wired the Regional Director in Buffalo a request to permit fifteen ill employees to vote by absentee ballots or at their homes. Eleven of the employees resided in Athens proper and four resided in Catskill, New York, a village adjacent to Athens. Part of the telegram stated that "eight of these employees have been out for at least a month, and some employees have been out for over six months".[21]

The telegram was received by the director during business hours on February 16, 1967, one day before the scheduled election, and the request was denied. At the election eleven of the fifteen "ill" employees appeared and voted.

The petitioner concedes that the Board's general policy is to refuse requests for absentee ballots, at least, in cases where no timely request was made. *McFarling Bros., Midstate Poultry and Egg Co.*, 123 N.L.R.B. 1384, 1392 (1959); *Franklin Stores Corp. of Daly City*, 117 N.L.R.B. 793, 795 (1957); *Red Owl Stores Inc.*, 114 N.L.R.B. 176, 177 (1955).[22]

It exhibits, however, a change of heart and opinion in this case. In its Request for Review of Supplemental Decision and Certification of Representatives, the employer sets forth the following ground:

> "(2) That there are compelling reasons for *reconsideration* of an important Board policy—namely, that where illness of eligible employees prevents

[21] Appendix p. 128.

[22] Petition p. 14

> them from appearing in person at a manually conducted election and knowledge of such inability to appear in person is known prior to the election on sufficient notice, these employees should be permitted to vote in a manner other than in person."[25]

Thus, the petitioner admits that what it seeks is a reconsideration by the Board of an important policy.

In its petition herein, however, it seeks to convince the Court that the Board *policy* is to grant such exceptions, if timely notice is given.

Assuming that the petitioner's method of negative-positive determinations of Board policy, to wit: ascribing to the Board a positive policy of granting special methods of voting, where a request is timely made, merely because in several cases the Board relied on the "timeliness" of the requests as one of the reasons for its refusal to grant them, the question arises whether the request in the instant case was timely.

As it appears from the contents of the telegram, the Company was aware of the illness of many of the employees mentioned therein for a period of over one month, and in several instances, for a period of over six months. Were it really interested in protecting the rights of the employees to vote, why has it failed to raise the question at the hearing? Why has it failed to raise the question soon after the Decision and Order of election was made, which was a full month prior to the date of the election? Why did the company wait with its request till the last day before the election? Was it part of its planned strategy of delaying and obstructing the rights guaranteed to its employees by Section 7 of the Act, instead of protecting their rights, as it claims?[26]

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[25] Appendix pp. 148-149.

[26] It is now nearly four years since the petition for certification was filed and the company is still not negotiating with the union.

Besides the names of the fifteen employees, listed in the telegram, the company failed to produce any affidavits of the individuals, or doctors' statements setting forth the nature of their alleged "illness". It is conceivable that the "illness" of the employees involved, as was the case with at least eleven of them, was of such nature that they could have appeared in person to vote. The telegram did not give any inkling of the nature of the illnesses.

In order for the Regional Director to comply with the telegraphic request, he would have had to adjourn the election, thereby delaying still further the opportunity of the employees to select a bargaining representative. Under the circumstances and in view of the fact that the employer was, apparently, aware of the alleged illnesses, its waiting with the request till the last day was certainly untimely, and was properly denied.

Furthermore, assuming that its request was granted, on the basis of the contents of the telegram, and it turned out that the claimed illnesses were of such a nature that they did not prevent the employees from appearing to vote, the granting of the request would certainly have been grounds for setting aside the election [23].

As the court below said in its decision:

> "We cannot say that the Regional Director's refusal to supplement the usual manual ballot procedures in this election in a small up-state New York town was such a violation of the rights of the employees as to render judicial intervention appropriate. See *International Tel. & Tel. Co.* v. *N.L.R.B.*, 294 F. 2d 393 (9 Cir. 1961). . . ."

The cases cited by the petitioner in support of its contention that the general Board policy is to permit home

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[23] In none of the numerous proceedings since the election did the company submit any affidavits or other documents showing the nature of the alleged illness and the reason for the employees' not having appeared to vote.

balloting (*Alterman-Big Apple Inc.*, 146 NLRB 1078 (1936); *E. I. Dupont de Nemour and Co.*, 79 NLRB 835 (1957) and *Verges Van Linens, Inc.*, 162 NLRB 1239 (1967)), are exceptions to the Board policy and as such they underline the Board's general policy.

Penn v. Sipes, 386 U.S. 171 (1967) and *Humphrey v. Moore*, 375 U.S. 335 (1964) involve interpretations of Section 301 of the Labor Management Relations Act and are inapplicable herein.

The other cases cited by the petitioner (*Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964)) involve the constitutionality of election statutes and are also inapplicable to the case at Bar.

POINT III

The Regional Director was not required to conduct a hearing on the issues presented.

On this point, too, the Petitioner, is misreading the decision of the Circuit Court, in asserting that the Court held "that a hearing was not required where the Regional Director did not disclose certain of the evidence on which he relied".[20]

This assertion is not only incorrect, but it attempts to subvert the facts and impugn certain irregularities and improper motives to the Regional Director.

The Court below in dealing with this issue said:

> "Respondent was given access to the affidavits taken by the Regional Director and opportunity of which it fully availed itself, to submit additional

[20] Petition p. 17.

> material. No issue of credibility is involved; decision turned on the inference to be drawn from largely undisputed facts, *and neither the Board nor we have been told of significant additional material that could be presented*". (emphasis supplied).

The Court below was rather lenient and mild in referring to "significant additional material". In fact, no *additional* material of any kind was ever presented by the company to the Regional Director or the Board besides the numerous affidavits submitted by the company to the Regional Director, which formed the sole basis for his determination. There was no evidence on which the Regional Director relied other than the affidavits submitted by the Petitioner.[27] There were no contradictory statements of fact requiring examination or cross-examination of witnesses. All affidavits were supplied in opposition to the challenge and none in support thereof. The only thing a hearing could accomplish is a repetition of the contents of the numerous affidavits and supplementary affidavits submitted by the company.

The Petitioner alleges that: "The fact remains that the Regional Director's determination was based in part on evidence obtained from witnesses whose testimony has never been made available to the company".[28]

The Petitioner's Request for Review of the Supplemental Decision and Certification of Representatives describes the nature of the Regional Director's investigation:

> ". . . The representative of the Regional Director took an affidavit from Robert Loar on March 20, 1967 and an affidavit from William F. Davenport the following day. These affidavits were taken without any opportunity for counsel for the employer to amplify or correct the affidavits by additional direct examination or cross examination. Upon an analysis of the

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[27] Appendix p. 182-222.

[28] Petition p. 18.

resulting affidavits, it became apparent that the material contained therein was neither accurate nor complete. *With the permission of the representatives of the NLRB, the Employer attempted to deal with this problem by submitting additional affidavits.* Subsequently, the Employer submitted additional affidavits from David W. Simmons, the Plant Manager; Harold Turner, an engineer; Walter Kramm, the Divisional Controller; and Fred Reisel, one of the two other shop clericals. Supplementary affidavits were also submitted from Mr. Lazar and from Mr. Davenport. No attempt was made by the investigator to take further statements from any of the persons from whom affidavits had been supplied to the Board. *The Employer has no knowledge as to what additional affidavits, if any, were obtained by the investigator with respect to the duties of William F. Davenport.* It is submitted, however, that the Employer does not know of anyone who could have better knowledge than the individuals named above who supplied affidavits to the Board"[29] (emphasis supplied)

The Request for Review then deals "with the serious inaccuracies, omissions and errors of fact contained in the clearly erroneous conclusion on the substantial factual question of the nature of Davenport's duties."[30] Neither in the Request for Review or in any other documents does the Petitioner allege any facts additional to those contained in the affidavits nor claim any newly discovered facts or evidence justifying a hearing.

The case of *Goldberg* v. *Kelly*, 90 S. C. 1011, decided on March 23, 1970, cited by Petitioner, involves the right of welfare recipients to a hearing in the event their benefits are withdrawn.

The case there dealt with relief recipients "who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance". The

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[29] Appendix pp. 151-152.

[30] Appendix p. 155.

petitioner in the instant case cannot compare itself to the relief recipient. It could and did afford experienced professional help. Nor does it lack the educational attainment to write effectively.

In *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963), the petitioner was denied admission to practice law by the Appellate Division of New York, which denial was based on information supplied by adverse individuals. Petitioner demanded, on several occasions, to be given the opportunity to confront his accusers and cross-examine them, which was denied.

The court at page 103 stated:

> "We have emphasized in recent years that procedural due process often requires consultation and cross-examination of those whose word deprives a person of his livelihood".

Justice Goldberg in his concurring opinion which is referred to by the petitioner, stated:

> "[A]s I understand the opinion of the court, [it] does not mean that in every case consultation and cross-examination are automatically required . . . the circumstances will determine the necessary limits and incidents implicit in the concept of a 'fair' hearing. *Thus, for example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant and it is plain . . . that . . . the recommendation is predicated thereon and reasonably supported thereby, then . . . the conclusion may [not] be properly challenged on due process grounds . . .*" (p. 107-108) (emphasis supplied)

CONCLUSION

The petition does not warrant the issuance of a writ of certiorari.

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Respectfully submitted,

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